

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2019/0007

BETWEEN:

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Appellant

and

DR. DENZIL DOUGLAS

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Douglas Mendes, SC with him, Ms. Talibah Byron, Mr. Michael Quamina and Ms. Leah Abdullah for the Appellant
Mr. Anthony Astaphan, SC and Mr. Delano Bart, QC with them, Mr. Kendrickson Kentish and Ms. Angelina Gracy Sookoo-Bobb for the Respondent

2019: June 20;
2020: March 12.

Civil appeal — Constitutional interpretation — Disqualification from National Assembly on account of circumstances which arose after election — Acknowledgment of allegiance, obedience or adherence to a foreign state — Section 28(1)(a) of the Constitution of Saint Christopher and Nevis — Diplomatic passport issued to respondent by the Commonwealth of Dominica — Whether respondent's application for, receipt and use of diplomatic passport issued by the Commonwealth of Dominica amounts to an acknowledgment of allegiance to the Commonwealth of Dominica — Section 31(3)(c) of the Constitution — Whether respondent required to vacate his seat in National Assembly

The respondent ("Dr. Douglas") is a citizen of Saint Christopher and Nevis, the Leader of the Opposition and a Member of Parliament, having been elected to the National Assembly (or "the Assembly"). At the invitation of the Prime Minister of the Commonwealth of Dominica (or "Dominica"), Dr. Douglas applied for a Dominican diplomatic passport. He

completed a passport application form with the exception of two columns of the form which required him to represent himself as a Dominican citizen, which he was not. The diplomatic passport was issued to Dr. Douglas by the Government of Dominica and the bio data page of the passport states that he is a citizen of Dominica. The passport also contains an endorsement requesting that he be accorded the protections of a citizen of Dominica. Dr. Douglas has used the passport to travel and gain entry to several countries for 'convenience of travel and business purposes'. The appellant (the "Attorney General") became aware of Dr. Douglas' diplomatic passport and filed an originating motion in the High Court on the footing of sections 28(1)(a) and 31(3)(c) of the Constitution of Saint Christopher and Nevis (the "Constitution") seeking, *inter alia*, a declaration that Dr. Douglas, by reason of his becoming a person who, by virtue of his own act, is under an acknowledgment of allegiance, obedience or adherence to the Commonwealth of Dominica, is automatically disqualified from sitting as a member of the Assembly and is required to vacate his seat.

The originating motion was heard and determined by a judge of the High Court. The learned judge determined that Dr. Douglas was not under an acknowledgment of allegiance in accordance with Dominican law, and refused the relief sought in the motion with no order as to costs.

The Attorney General appealed. The main issue for this Court's determination is whether Dr. Douglas, by his application for, receipt and use of a Dominican diplomatic passport, is under an acknowledgment of allegiance, obedience or adherence to a foreign power or state, in terms of section 28(1)(a) of the Constitution, and is therefore required to vacate his seat in the National Assembly in accordance with section 31(3)(c) of the Constitution.

Held: allowing the appeal; declaring that Dr. Douglas is required to vacate his seat in the Assembly; and ordering that each party shall bear their own costs before this Court and in the court below, that:

1. Section 28(1)(a) of the Constitution provides for three distinct legal requirements to be proved for a person to be disqualified from sitting in the Assembly. There must be: (i) a *de jure* allegiance owed to a foreign power or state; (ii) some voluntary act on the part of the allegedly disqualified person; and (iii) the voluntary act by the allegedly disqualified person amounts to an acknowledgment of that allegiance. This disqualifying provision was included in the Constitution as a means of avoiding the possibility of elected members having split loyalties which would render them incapable of acting in the interests of Saint Christopher and Nevis, in circumstances where such acts are diametric to the interests of the state to which they possess a competing loyalty.

Section 28(1)(a) of the **Constitution of Saint Christopher and Nevis**, Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009 applied; **Sykes v Cleary** [1992] HCA 60 applied; **Hewitt v Rivers, Solomon and Attorney General** [2013] (2) CILR 262 applied.

2. By the issuance of a passport, a state undertakes an obligation of protection in respect of the passport holder, such that would give rise to a corresponding obligation of fidelity or allegiance. This applies equally to diplomatic passports. By issuing a diplomatic passport, upon the application of Dr. Douglas, the Commonwealth of Dominica consented to the presentation and use by Dr. Douglas of the passport and to him praying in aid the state's protection at his convenience. Accordingly, Dr. Douglas has been vested with a concomitant duty of obedience or allegiance to the Commonwealth of Dominica.

Joyce v Director of Public Prosecutions [1946] AC 347 applied; **Sykes v Cleary** [1992] HCA 60 applied; **Hewitt v Rivers, Solomon and Attorney General** [2013] (2) CILR 262 considered; **Hicks v Ruddock** (2007) 156 FCR 574 considered.

3. It is evident that there must be some element of knowledge and participation in the acts which are claimed to have placed a person under an acknowledgment of allegiance, whether that participation is active or passive. The requirement for voluntariness of conduct is imported by the words "by his own act" contained in section 28(1)(a). In this case, the voluntariness of the acts which were claimed to place Dr. Douglas under an acknowledgment of allegiance, is undisputed as he admitted that he applied for, received and used the Dominican diplomatic passport to travel.

Section 28(1)(a) of the **Constitution of Saint Christopher and Nevis**, Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009 applied.

4. Whether there has been an acknowledgment of allegiance is a determination to be made on the facts of each case. Here, Dr. Douglas invoked the protection and privileges of the state of Dominica, by the presentation of his diplomatic passport, knowing that the passport represented him as a subject and citizen of Dominica and not Saint Christopher and Nevis. The terms of the passport are unequivocal, very clearly represent Dr. Douglas as a citizen of Dominica and request that he be accorded the protections of a Dominican citizen. Accordingly, an acknowledgment of allegiance in respect of which section 28(1)(a) of the Constitution is aimed has been made out.

Joyce v Director of Public Prosecutions [1946] AC 347 considered; **Sykes v Cleary** [1992] HCA 60 considered; **Hewitt v Rivers, Solomon and the Attorney General** [2013] (2) CILR 262 considered; **Dabdoub v Vaz** (CA 45 & 47 of 2008, 13th March 2008) considered; **Green and Joseph v Saint Jean and Skerrit** DOMHCVAP2012/0001 (delivered 11th March 2013, unreported); **Nile v Wood** [1988] HCA 30 considered.

JUDGMENT

- [1] **PEREIRA CJ:** This appeal arises from a judgment dated 20th February 2019 by which a judge of the High Court dismissed the Attorney General's originating motion which sought declarations and an injunction in respect of the respondent, Dr. Denzil Douglas ("Dr. Douglas"), with a view to having him vacate his seat in the National Assembly of Saint Christopher and Nevis. The appeal raises a singular issue, that is, whether Dr. Douglas who, by his application for, receipt and use of a diplomatic passport issued by the Commonwealth of Dominica (or "Dominica"), amounts to him acknowledging an allegiance to Dominica. The consequence of so finding would place Dr. Douglas in breach of section 28(1)(a) of the **Constitution of Saint Christopher and Nevis**¹ (the "Constitution") and consequently disqualify him from sitting as a member of the National Assembly (or "the Assembly"). Put another way, although there is no question of Dr. Douglas being unduly returned or that his election was invalid at the time he was elected at the last General Election, a finding that his subsequent acquisition and use of a passport issued by the Commonwealth of Dominica, would require him to vacate his seat in the Assembly. Throughout this judgment, the use of the phrase 'acknowledging or acknowledgment of an allegiance' is used as shorthand for 'acknowledging or acknowledgement of obedience or adherence' as in my view they connote the same thing.

Background

- [2] The facts underpinning this appeal are largely undisputed. Dr. Douglas is a citizen of Saint Christopher and Nevis, the Leader of the Opposition and a Member of Parliament, having been elected to the National Assembly on 15th February 2015. At the invitation of the Prime Minister of Dominica, Dr. Douglas applied for a Dominican diplomatic passport. He completed a passport application form with the exception of two columns of the form which required him to represent himself as a Dominican citizen, which he was not.

¹ Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009.

- [3] The diplomatic passport was issued to Dr. Douglas by the Government of Dominica on 30th July 2015 with an expiry date of 29th July 2020. The bio data page of the passport issued to Dr. Douglas states that he is a citizen of Dominica, and the passport itself contains the following endorsement:

“The President of the Commonwealth of Dominica requests and requires in the name of the Government of Dominica all those whom it may concern to allow the bearer to pass freely without let or hindrance and afford the bearer such substance and protection as may be necessary.”

Dr. Douglas has used the passport to travel and gain entry to seven countries on ten different occasions for ‘convenience of travel and business purposes’.

- [4] The Attorney General of Saint Christopher and Nevis (the “appellant”) became aware of Dr. Douglas’ diplomatic passport and filed an originating motion in the High Court pursuant to section 36 of the Constitution. The motion was made on the footing of sections 28(1)(a) and 31(3)(c) of the Constitution. Section 28(1)(a) reads:

“(1) A person shall not be qualified to be elected or appointed as a member if he or she:

- (a) is, by virtue of his or her own act, under any acknowledgment of allegiance, obedience or adherence to a foreign power or state...”.

Section 31(3)(c) reads:

“An elected or appointed member shall also vacate his or her seat in the Assembly

...

- (c) subject to subsection (4), if any other circumstances arise that, if he or she were not a member, would cause him or her to be disqualified to be elected or appointed as such by virtue of subsection (1) of section 28 or of any law enacted in pursuance of subsection (2), (3) or (5) of that section...”.

- [5] The appellant's claim was that Dr. Douglas, by his application for, receipt and use of a Dominican diplomatic passport, was under an acknowledgment of allegiance, obedience or adherence to a foreign power or state (Dominica). Accordingly, the appellant claimed that Dr. Douglas was automatically disqualified from sitting as a

member of the National Assembly and was required to vacate his seat. The appellant's originating motion sought the following relief:

- (i) A declaration that Dr. Douglas became disqualified from being elected as a member of the National Assembly and was accordingly required to vacate his seat in the National Assembly by reason of his becoming a person who, by virtue of his own act, is under an acknowledgment of allegiance, obedience or adherence to the Commonwealth of Dominica.
- (ii) A declaration that Dr. Douglas has vacated his seat in the National Assembly of Saint Christopher and Nevis; and
- (iii) An injunction restraining Dr. Douglas from taking his seat in the National Assembly and from performing his functions as a member thereof.

Dr. Douglas strenuously resisted the motion.

- [6] Before the originating motion was heard, the judge, following an interlocutory hearing, concluded that the question of whether Dr. Douglas was under an acknowledgment of allegiance was to be determined in accordance with Dominican law. The judge found that Dominican law was a question of fact to be proved by way of expert evidence, and permitted the parties to file, serve and rely on evidence to that effect. In accordance with the judge's order, the parties filed 3 expert reports.
- [7] The motion was heard pursuant to the High Court's jurisdiction under section 36(1)(d) of the Constitution to determine whether any member of the National Assembly is required to vacate their seat in accordance with the Constitution. By his judgment dated 20th February 2019, the learned judge determined that Dr. Douglas was not under an acknowledgment of allegiance in accordance with Dominican law, and refused the relief sought in the motion with no order as to costs.

The appeal

- [8] The appellant appealed the learned judge's judgment, advancing six grounds of appeal. The issue for determination before this Court is, as stated at paragraph 1 above, whether Dr. Douglas, by his application for, receipt and use of a Dominican diplomatic passport, was under an acknowledgment of allegiance, obedience or adherence to a foreign power or state, in terms of section 28(1) and is therefore required to vacate his seat in the National Assembly in accordance with section 31(3)(c) of the Constitution.
- [9] Before dealing with the main issue on the appeal, there is need first to discuss the approach that this Court is required to take to the interpretation and application of Dominican law, which was central to the learned judge's findings on the originating motion.

Proof of Dominican law before the Court of Appeal

- [10] There is no dispute that the question of whether a member of the National Assembly is under an acknowledgment of allegiance to a foreign state is to be determined with recourse to the laws of the foreign state to which the member or proposed member of the Assembly is said to have an allegiance – in this case, the laws of Dominica. The Court has long recognised that this is the appropriate course. As Baptiste JA opined at paragraph 11 of **Cedric Liburd v Eugene A. Hamilton et al and The Attorney General of Saint Christopher and Nevis v Cedric Liburd et al**:

"It emerges from the case of **Sykes v Cleary** [1992] HCA 60; (1992) 176 CLR 77 that the question whether a person is by virtue of his own act, under an acknowledgement of allegiance, obedience or adherence to a foreign power or state, is to be determined in accordance with the provisions of the applicable foreign law."²

² Saint Christopher and Nevis High Court Civil Appeals Nos. 17 & 18 of 2010 (delivered 5th December 2011, unreported).

[11] Along those same lines, in my judgment in **Ronald Green v Petter Saint Jean and Maynard Joseph v Roosevelt Skerrit**,³ on the issue of proving foreign law in the context of a challenge to the validity of a member's election, I stated:

“The consequences of disqualification under any grounds of the Constitution, particularly under 32(1)(a) require very specific proof of what is alleged. It is therefore very necessary for a person who is challenging the nomination or election of a candidate on the basis that the candidate has obtained or renewed or travelled on a foreign passport, to plead and prove the foreign law. It cannot be enough to assume on a presumption, the application of local law by default.”

[12] As a preliminary point, it is necessary to determine whether the Court of Appeal of the Eastern Caribbean Supreme Court is required to treat with Dominican law to be proved by the parties as a question of fact, or inversely, whether this Court can take judicial notice of the laws of Dominica and apply them accordingly. The conclusion on this preliminary issue is of much consequence, as if it is determined that Dominican law must be treated by this Court as a question of fact, the Court would be largely bound by the findings of fact made by the judge on the question of foreign law.⁴

[13] The **Eastern Caribbean Supreme Court Order, 1967**⁵ (“the Order”), which establishes the Court of Appeal is instructive on this point. The Order establishes this Court as the single court of appeal for Saint Christopher and Nevis and the Commonwealth of Dominica along with the other states under the Supreme Court's jurisdiction. Sections 4(1) and 4(2) of the Order provide:

“(1) There shall be a Supreme Court for the States which shall be styled the Eastern Caribbean Supreme Court and shall be a superior court of record.

(2) The Supreme Court shall consist of a Court of Appeal and a High Court of Justice.”⁶

³ DOMHCVAP2012/0001 (delivered 11th March 2013, unreported) at para. 32.

⁴ See for example *Thompson v Christie Manson & Woods Limited & Ors* [2005] EWCA Civ 555.

⁵ S.I. No 223 of 1967.

⁶ “States” is defined to include Dominica and Saint Christopher and Nevis – section 2(1) of the Order.

[14] Section 9 of the Order provides for the jurisdiction of the Court in its member states, *inter alia*, in the following terms:

“(2) The Court of Appeal shall have, in relation to a State, of such jurisdiction to hear and determine appeals and to exercise such powers as may be conferred upon it by the Constitution or any other law of the State.

(3) The process of the Supreme Court shall run throughout the States and any judgment of the Court shall have full force and effect and may be executed and enforced in any of the States.”

[15] The provisions of the Order put beyond doubt that the Court of Appeal is a *forum commune* (or common forum) for both Saint Christopher and Nevis and Dominica, and a single, unitary structure in the context of all the states under its jurisdiction, which is competent to discern, interpret and apply the laws of those states. The Court of Appeal is, in this regard, very similarly situated to the United Kingdom Supreme Court (formerly the House of Lords) as an appellate court with jurisdictional competence in respect of more than one state (in the case of the United Kingdom Supreme Court – England and Scotland). On account of this similarity, the observations of the House of Lords in **MacShannon v Rockware Glass Ltd.**,⁷ **Cooper v Cooper and Ors**⁸ and **Elliot v Lord Joicey and Ors**,⁹ all of which were cited by the appellant, in respect of the jurisdiction of the House of Lords as the final court of appeal for England and Scotland to consider questions of English and Scottish law, are in my view applicable to this Court. Lord Tomlin in **Elliot v Lord Joicey**, in the most direct terms, held as follows:

“Your Lordships’ House, as the ultimate appellate tribunal both of England and of Scotland, does not require proof of law of either country, whether the case under consideration be an English case in which a question of Scots law arises, or a case from Scotland in which a question of English law arises...”

[16] As the *forum commune* for both Saint Christopher and Nevis and the Commonwealth of Dominica under the Order, this Court is entitled to deal with the question of allegiance under Dominican law as a legal question, and not as a

⁷ [1978] AC 795.

⁸ (1883) 13 App Cas 88.

⁹ [1935] AC 209.

question of fact to be determined on the basis of expert evidence. Neither is this Court bound to treat with caution the findings of fact based on the expert evidence adduced before the learned trial judge, as required by the authorities like **Thompson v Christie Manson & Woods Limited & Ors.**¹⁰ Of course, the position would be different were the foreign law in question the law of a country not under the jurisdiction of the Court – this was the case in **Ronald Green v Petter Saint Jean and Maynard Joseph v Roosevelt Skerrit** where the question of an elected official's allegiance was to be determined in accordance with the laws of France. In such a case, the Court of Appeal would be required to treat with the question of foreign law as a question of fact, and would be required to treat the findings of the High Court on this matter with care.

- [17] Having dealt with this preliminary point, I now proceed to address the relevant provisions of the Constitution.

The Constitution

- [18] The High Court has express jurisdiction under section 36(1)(d) of the Constitution to hear and determine any question whether a member of the National Assembly has vacated his or her seat in accordance with section 31(3)(c) which is set out above. The question of whether a member of the National Assembly has vacated their seat, unlike the question of whether a member has been validly elected to the National Assembly, arises from an examination of the circumstances which arise after the election of member to the Assembly and not matters which persist at the time of the member's election. In **Christopher Ram v The Attorney General of Guyana**,¹¹ the Caribbean Court of Justice examined article 156(1)(d) of the Constitution of Guyana which is equivalent to section 31(3)(c) of the Constitution of Saint Christopher and Nevis. Saunders PCCJ in **Ram** stated as follows:

“Article 156(1)(d) speaks to some supervening event that causes a person to become disqualified while he or she was a member of the Assembly. So, if when the person is a member, s/he acknowledges allegiance to a

¹⁰ [2005] EWCA Civ 555.

¹¹ [2019] CCJ 10 AJ.

foreign power or is certified to be insane, to cite two examples, the person is then obliged to vacate the seat.”

[19] The appeal therefore centres on the ability of the appellant to prove, as alleged, that the respondent was required by virtue of the Constitution to vacate his seat, having satisfied one of the disqualifying provisions set out in the Constitution whilst a member of the National Assembly. The interpretation and application of section 28(1)(a) of the Constitution are brought into sharp focus. For emphasis, section 28(1)(a) reads:

“(1) A person shall not be qualified to be elected or appointed as a member if he or she:

(a) is, by virtue of his or her own act, under any acknowledgment of allegiance, obedience or adherence to a foreign power or state...”.

[20] It is now trite that post-independence Commonwealth constitutions are “ ‘sui generis’ [instruments] calling for principles of interpretation of [their] own, suitable to [their] character and are to be interpreted generously, purposively and with a view to avoiding ‘tabulated legalism’”.¹² As Lord Keith in **Attorney General of Trinidad and Tobago v Whiteman**¹³ said: “the language of the constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit...”.

[21] The interpretation of constitutional texts must begin with an examination of the language used in the context of the object and purpose of the relevant provisions. On this point, the words of Byron CJ in **Attorney General of Grenada v The Grenada Bar Association**¹⁴ at paragraph 7 are germane. There, Byron CJ said:

“The nature of a Constitution requires that a broad, generous and purposive approach be adopted to ensure that its interpretation reflects the deeper inspiration and aspiration of the basic concepts on which the Constitution is founded. Respect must be paid to the language that is used and its context, by considering all relevant provisions bearing on the subject for interpretation as a whole, and to the traditions and usages

¹² See: *Minister of Home Affairs v Fisher* [1980] AC 319.

¹³ [1991] UKPC 16.

¹⁴ Grenada Civil Appeal No. 8 of 1999 (delivered 21st February 2000, unreported).

which have given meaning to that language, in order to effect the objective of the Constitution.” (Underlining supplied)

- [22] Important is the fact that constitutions are not rigid texts which are of fixed application and which contemplate limited matters; they are rather living instruments that are always speaking. Accordingly, the fact that particular circumstances would not have been contemplated at the time of the framing of a constitution is not a bar to its application to the circumstances. Indeed, and as Jackson JA in **Inland Revenue Commissioners and Attorney General v Lilleyman and Others**¹⁵ stated: ‘[a constitution’s] full import and true meaning can often only be appreciated when considered as the years go on, in relation to the vicissitudes of fact which from time to time emerge’.
- [23] The rule that a constitution is a speaking, living instrument is however one which must be cautiously deployed, must never operate to abrogate or abscond the clear words of the constitution, and must truly operate towards the furtherance of the legitimate objective of its provisions and the constitution as a whole. This is the tenor of pronouncements of the Privy Council in a long line of cases, including **Boyce v R**¹⁶ wherein Lord Hoffman stated:
- “The ‘living instrument’ principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with ‘international obligations’, ‘generous construction’ and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a potion which will make the Constitution mean something which it obviously does not.”
- [24] The effect of all the authorities I have recited above, is that the starting point of interpreting the Constitution in this case is to examine its words, pivoted against the generous, broad and purposive interpretation of the constitution, with a view to arriving at the construction which keeps true to both its text and sui generis nature, while avoiding any overextension of the words of the Constitution.

¹⁵ (1964) 7 WIR 496.

¹⁶ [2004] UKPC 32.

[25] It is without doubt that there is not much clear authority on what conduct satisfies the requirements of section 28(1)(a) of the Constitution, notwithstanding that the provision is of some vintage, and exists in similar forms across the Commonwealth. Furthermore, there is not much said on the effect of a passport (far less a diplomatic passport) for the purposes of the provision. Applying the learning in **Inland Revenue Commissioners and Attorney General v Lilleyman and Anor**, the fact that these matters have seldom arisen, or may not have been contemplated by the express words used by the framers of the Constitution, is of little import to the outcome of the matter. The Court is nonetheless enjoined to determine the meaning of the words in light of the spirit of the Constitution, and to undertake an interpretative exercise having regard to the matters outlined by Byron CJ in the **Grenada Bar Association** case quoted above.

[26] It is evident that the Constitution does not permit unfettered access to the membership of the constitutionally entrenched National Assembly. Section 28(1)(a) contains but one basis upon which a person will, by law, be disqualified from sitting as a member of the Assembly. On my reading of section 28(1)(a), there appears to be three distinct legal requirements to be proved in order for a person to be disqualified from sitting in the Assembly on the basis of the section. There must be:

- (i) a de jure allegiance owed to a foreign power or state;
- (ii) some voluntary act on the part of the allegedly disqualified person; and
- (iii) the voluntary act by the allegedly disqualified person amounts to an acknowledgment of that allegiance.

[27] The purpose of this form of parliamentary disqualification was stated very concisely by Brennan J in **Sykes v Cleary**,¹⁷ in relation to section 44(i) of the Constitution of Australia which is similar to section 28(1)(a) of the Constitution. In **Sykes**, Brennan J opined that 'section 44(i)'s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament'. This is the very immediate conclusion to be arrived at by the fact that this sort of

¹⁷ [1992] HCA 60.

disqualifying factor was included in the constitutions. Brennan J further opined that the section was designed to ensure that 'members of Parliament did not have split allegiance and were not, as far as possible, subject to any improper influence from foreign government'.

- [28] Smellie CJ in **Hewitt v Rivers, Solomon and Attorney General**¹⁸ expressed a more detailed view on the purpose of the equivalent disqualifying provision contained in the Constitution of the Cayman Islands. Smellie CJ in his judgment briefly set out the historical underpinnings of the provision, tracing it back to the British Act of Settlement 1701 and opined:

"81. The requirement, expressed as a disqualifying factor where it is not satisfied, is one that has a long established history in British constitutional law, going back to the Act of Settlement 1701 (s.3 (among other things) disqualified those born outside the Kingdoms of England, Scotland and Ireland and the Dominions from holding office in the Privy Council or the Parliament and from holding any office of trust under the Crown) and even before then, as it was developed and recognized at common law (see Erskine May, *Parliamentary Practice*, 22nd ed., at 40 (1997)).

82. The recognized rationale for this ground of disqualification is the avoidance of an actual or perceived split of allegiance or divided loyalty on the part of members of parliament (see Carney, *Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification*, 11(2) *Bond Law Review*, 245 (1999)).

83. The provision exists to ensure that members of the Legislative Assembly do not have dual allegiance and will not be subject to influence from any foreign government which could be inimical to the interests of the Cayman Islands."

- [29] Like Brennan J and Smellie CJ, I am of the firm view, that this particular disqualifying provision was included in the Constitution as a means of avoiding the possibility of elected members having split loyalties which render them incapable of acting in the interests of Saint Christopher and Nevis in circumstances where such acts are diametric to the interests of the state to which they possess a competing loyalty. This, rather undesirably, would handicap the ability of elected

¹⁸ 2013 (2) CILR 262.

members to effectively carry out their parliamentary functions in the interests of the state and is counterintuitive to the administration of a sovereign democratic state. If seized of split loyalties, an elected representative would in these circumstances be under the constant threat of legitimate prosecution for treason, were they to fulfil their obligations as an elected official. It matters not, within the Caribbean context of both states being members of the grouping of the Organisation of Eastern Caribbean States, that such prosecution may be highly unlikely. What matters, is the legal possibility of such.

[30] The high importance of section 28(1)(a) is evidenced by section 33(3)(c) which specifies the legal consequence of an elected member being found in breach of the section. The Constitution does not place a discretion within the courts to apply or disapply its provisions in this regard; as a matter of law, rather, disqualification and vacation are the automatic legal consequences. This end-result, though severe in nature, is what was expressly contemplated by the framers of the Constitution, with a view to furthering the objective of its provisions. Given the plain words, purpose and legal effect of the Constitution in this regard, the Court is therefore required to apply these provisions strictly.

[31] I now examine and apply the requirements of section 28(1)(a) to the facts of this appeal, against the background I have just set out.

Requirement (i) – A de jure allegiance to a foreign power or state

[32] That the Commonwealth of Dominica is a foreign power or state is not in issue in this appeal, though the point was taken in the court below. It is clear, in any event, that Dominica is a foreign state for the purposes of the Constitution, notwithstanding the fact that Dominica is a member of the Organisation of Eastern Caribbean States, the Caribbean Community and the Commonwealth of Nations. As the learned judge found:

“[21] The Constitution of Saint Kitts and Nevis declares in Chapter 1 that it is a sovereign democratic state. Both St. Kitts and Nevis and Dominica are vested with independent international legal personalities. They have

separate and distinct laws relating to citizenship and its citizens owe different allegiances. Their respective exercise of sovereignty is completely independent of each other.

[22] The fact that for the limited purposes of the Citizenship Act, Dominica is not regarded as a foreign country does nothing to attenuate or negate its status as a sovereign, independent state and thus a foreign power or state within the meaning of section 28(1)(a)."

[33] The parties' submissions on this point rather revolve around whether Dr. Douglas' application for, receipt and use of the Dominican diplomatic passport gave rise to an allegiance. It is very clear that whether the issuance of a diplomatic passport gives rise to an allegiance is not determined by the plain words of the Constitution or by any Dominican legislation. The Court must therefore have recourse to the common law of Dominica. There does not appear to be any authority binding on Dominica which speaks to whether a diplomatic passport confers an allegiance on the passport holder. I therefore agree with the appellant that the Court must look to the common law on the effect of an ordinary passport to determine whether, by extension, it can be made to apply to Dr. Douglas' diplomatic passport.

[34] The appellant has two broad submissions in this regard which are hinged primarily on the application of the House of Lords decision **Joyce v Director of Public Prosecutions**.¹⁹ Firstly, the appellant argues that **Joyce** is authority for the broad proposition that the possession of a passport by a non-national or alien is sufficient to place that person under an allegiance to the issuing country. The appellant says that **Joyce** is not limited to extending an allegiance in circumstances where the possessor of the passport was under a previously existing allegiance. In support of this argument, the appellant cited a number of decisions from a range of Commonwealth jurisdictions which, it is suggested, interpret and apply **Joyce** along the same lines.²⁰ Secondly, the appellant argues that the principle in **Joyce**

¹⁹ [1946] AC 347.

²⁰ *Sykes v Cleary* (1992) 109 ALR 577; *Hicks v Ruddock* [2007] 2 LRC 560; *Hewitt v Smith* (Cause No. 198 of 2013, 9th August 2013); *R v Arrowsmith* [1975] 1 QB 678; *Dabdoub v Vaz* CA 45 & 47 of 2008 (delivered 13th March 2008, unreported); *Green and Joseph v Saint Jean and Skerit* DOMHCVAP2012/0001 (delivered 11th March 2013, unreported); *Re R. (G.E) (An Infant)* [1965] Ch. 568; *Minister of Immigration and Ethnic Affairs v Petrovski* (1997) 154 ALR 606.

applies to diplomatic passports as there is no real difference in effect between a diplomatic passport and an ordinary passport.

- [35] The respondent does not appear to dispute that **Joyce** is part of the common law of Dominica and binding in its courts. The respondent however submits that **Joyce** is not applicable to this appeal as it does not determine whether a non-citizen owes an allegiance to a foreign state by applying for, receiving and using an ordinary or diplomatic passport. The respondent very stridently argues that **Joyce** does not extend to the holder of a foreign passport who had no existing allegiance at the time the passport was acquired, who never declared citizenship to the foreign state and who never swore an oath of allegiance.
- [36] Having carefully considered **Joyce**, and in particular the leading judgment of Lord Jowitt, I am convinced of the correctness of the appellant's position that the case is, in the broader sense, determinative of whether an ordinary passport, issued to a non-national or alien, will give rise to an allegiance.
- [37] **Joyce** was an appeal against conviction on the basis that the appellant, William Joyce ("Joyce"), did not have an allegiance to England and therefore could not have properly been convicted under the UK Treason Act. Joyce was a natural born citizen of the United States of America. At a young age, he relocated to Ireland and later to England where he settled. Joyce was never a citizen of England. He never swore allegiance to England. For the duration of his residence there, Joyce possessed what is termed in law as a "local allegiance" to the state - by his presence in England, the state had an obligation to protect him, which gave rise to a duty of fidelity or allegiance on his part to the state.
- [38] Joyce applied for a British passport to facilitate his holiday travels. In his passport application, he misrepresented himself as a British subject. He was granted the passport for a period of 5 years. He applied on two later occasions for a renewal

of the passport for one-year periods. In his renewal applications, Joyce again represented himself as a British subject. His passport was renewed as requested on both occasions.

[39] At a time when his British passport was valid, Joyce travelled to Germany where he committed certain treasonous acts against England. Joyce was brought back to England and tried and convicted for treason under the Treason Act. Joyce appealed. It was clear that had he committed the treasonous acts while in England, his conviction would properly have flowed from a breach of the local allegiance he owed to the state by virtue of his long-residence there. It was however unclear whether, since his departure from England, he had retained his allegiance to the state, and therefore could properly be tried for treason. Lord Jowitt stated the issue before the House of Lords as follows: ‘...whether an alien who has been resident within the realm can be held guilty and convicted in this country for high treason in respect of acts committed by him outside the realm’. The House of Lords found that by his application for, receipt and use of a British passport, Joyce had extended the allegiance which he formerly owed to the state (his local allegiance), while he was resident there. It did not matter that the passport was obtained by way of misrepresentation, or that he did not take an oath of allegiance.

[40] To the extent that it can be said that the court’s focus was on whether Joyce’s previous local allegiance to the state was extended by virtue of his passport, it must be borne in mind that those were the particular facts of the case. The case however did not turn on the fact that Joyce was an alien. Neither did the case turn on the fact that he was long-resident in England. Instead, Joyce’s appeal was determined by the examination and application of the unqualified common law principles underpinning the foundation of an allegiance. The House of Lords recognised that an allegiance in law arises from the obligation on the part of a state to protect an individual. The court very clearly considered a passport to be in the nature of documents which are capable of giving protection and found that by the issuance of a passport to Joyce, the state had undertaken an onerous burden

of protection over him. Lord Jowitt remarked that a passport ‘gives...rights and imposes upon the sovereign obligations which would otherwise not be given or imposed’. He continued:

“By his possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects... To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial privileges.”

- [41] From that burden of protection, flowed a concomitant obligation of fidelity or allegiance on the part of Joyce. It is clear from Lord Jowitt’s judgment, that under the common law, where a state has undertaken an obligation to protect a person (for example by the issuance of a passport), a concomitant duty of fidelity or allegiance arises as a matter of law. I would therefore frame the conclusion and principle emanating from **Joyce** in the broad terms used by Smellie CJ in **Hewitt v Rivers, Solomon and the Attorney General**:

“The principle decided by the House of Lords was that, by virtue of his application for, and the grant of, a British passport, although an alien, Joyce was deemed to owe allegiance to the British Crown. This, on the basis that the passport afforded him the protection of the Crown to which he otherwise would not have been entitled and, in return, the Crown demanded his allegiance during the currency of the passport. His treasonous acts committed while he held a valid British passport made him liable for prosecution despite his status as an alien and despite having been committed abroad in Germany.”

- [42] I am further fortified in my interpretation of **Joyce** and my acceptance of the broad principle derived therefrom, by the decisions of **Sykes v Cleary** and **Hicks v Ruddock**²¹ which appear to interpret **Joyce** along the same lines. I cannot therefore agree with the respondent and the learned judge that **Joyce** applies only to instances where an alien is already in possession of an allegiance. As the appellant says, **Joyce** is relevant authority on the legal effect of a non-citizen applying for, possessing and using a foreign passport, generally, and not merely on the effect of a passport within the context of a non-citizen’s long-residence in and pre-existing allegiance to a state.

²¹ (2007) 156 FCR 574.

- [43] Having determined that **Joyce** is relevant authority on the legal effect of a non-citizen's application for, receipt and use of an ordinary passport, the question is whether the principles contained in that case can be extended to the present appeal. There are a number of facts and circumstances which the respondent urges remove a diplomatic passport from the reach of the principle established in **Joyce**: first, that the issuance of a diplomatic passport does not require the receiver to take an oath of allegiance to Dominica; second, that a diplomatic passport is revocable at the will of the government; third, that the issuance of a diplomatic passport does not have the statutory foundation that an ordinary passport has and is discretionary; and fourth, that an oath of allegiance need not be sworn by the recipient of such a passport.
- [44] I agree with the appellant that these factors have no real bearing on whether **Joyce** is authority on the effect of diplomatic passports. As the House of Lords noted in **Joyce**, the conferral of an allegiance is not dependent on a positive declaration or oath of allegiance, but will also arise as a matter of law where there is an obligation on the part of the state to protect an individual. Furthermore, the legal basis for the issuance of the passport was not in any way determinative of the nature of the passport in **Joyce** - there is therefore no basis for the use of an ordinary passport's statutory underpinnings as a distinguishing factor between ordinary and diplomatic passports, unless there is some suggestion that statute acts to alter the effect of an ordinary passport; no such suggestion is made in this case.
- [45] Similarly, the fact that a diplomatic passport is revocable at the will of the state or does not require the holder to take an oath of allegiance, cannot, to my mind, distinguish the effect of a diplomatic passport from an ordinary passport. On the contrary, whether ordinary and diplomatic passports confer allegiance in the same way is a strict legal question. **Joyce** is clear that the determinative feature on the legal effect of a passport, is that by the issuance of a passport, there is undertaken by a state an obligation of protection in respect of the passport holder, such that

would give rise to a corresponding obligation of fidelity or allegiance on the part of that person. In relation to the respondent's diplomatic passport therefore, the question is whether by that diplomatic passport, the state of Dominica undertook an obligation to protect the respondent, thus invoking a concomitant duty of fidelity or allegiance to the state on the part of the respondent.

- [46] The terms of the respondent's diplomatic passport are unequivocal. The passport, by the terms of its endorsement reproduced at paragraph 3 above, is a clear recognition by the state of Dominica of its obligations in relation to the respondent. It requests in the name of the President, the protections to which the state and its agents are entitled by virtue of Dominica's relationship with the receiving state. The receiving state would be entitled and expected to extend all necessary privileges and assistance to which Dominica is afforded pursuant to the relationship existing as between Dominica and the receiving state. As Lord Jowitt said:

"By its terms it requests and requires in the name of His Majesty [the President of Dominica] all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need."²²

- [47] By its issuance of a diplomatic passport upon the application of Dr. Douglas, endorsed in the manner that it was, the state of Dominica very clearly consented to the presentation and use by Dr. Douglas of the passport and to him praying in aid the state's protection at his convenience. Further, the issuance of the diplomatic passport is evidence that the state has undertaken to offer protection to Dr. Douglas in the event that he seeks it. It is to my mind ineluctable to conclude that the application for, receipt and use of the respondent's diplomatic passport in these circumstances, for the extent of its validity, invoked the protection of the state of Dominica, and by that fact, the respondent has been vested with a concomitant duty of obedience or allegiance to Dominica.

²² Supra, n. 18 at p.369.

[48] In my view, the use of a diplomatic passport, if any at all possible, gives rise to an even larger duty of protection and corresponding obligation of fidelity as, by using the diplomatic passport upon travel, the respondent is in fact holding himself out to be a diplomatic agent and representative of the government and interests of the Commonwealth of Dominica, thereby entitling him to the suite of extravagant protections and privileges located in the Vienna Convention of Diplomatic Relations and/or any other reciprocal arrangements existing between the Commonwealth of Dominica and the states to which the respondent travelled. These are privileges and protections to which an ordinary passport holder has no access and are enjoyable as a result of Dominica's international relations, as a sovereign and independent actor within the realm of international law. In my view, this fact leaves very little scope to sensibly argue that a diplomatic passport is unlike an ordinary passport, or that the principles in **Joyce** are inapplicable to diplomatic passports.

[49] In summary therefore, I find that:

- (i) the principles in **Joyce** are applicable to diplomatic passports as they are applicable to ordinary passports; and that
- (ii) as a result, the issuance of a diplomatic passport containing the usual endorsement gives rise to an allegiance on the part of the holder of the passport to the state which has issued the diplomatic passport.

Applying the above, the conclusion on this point is clear. In as much as Dr. Douglas was issued a diplomatic passport, the state assumed an obligation of protection over him. Dr. Douglas was therefore, by operation of law, vested with a concomitant duty of allegiance or fidelity to Dominica. The first requirement of section 28(1)(a) is satisfied.

Requirement (ii) – Voluntariness of conduct

[50] As to the second requirement under section 28(1)(a), the requirement for voluntariness of conduct is imported by the words "by his **own** act" (my emphasis)

which are contained in the section. It is evident that there must be some element of knowledge and participation in the impugned acts, whether that participation is active or passive.

- [51] The voluntariness of the acts which the appellant claims have put the respondent under an acknowledgment of allegiance, have never been in dispute – the respondent has admitted, without difficulty, that he applied for, received and used the Dominican diplomatic passport. This requirement is therefore uncontroversial and is established on the facts.

Requirement (iii) – Acknowledgment of allegiance

- [52] On this point, the appellant submits that **Joyce** and all the decisions applying **Joyce**, make clear that the application for, receipt and use of a foreign passport place the respondent under an acknowledgment of allegiance.
- [53] It is clear to me that the application of **Joyce** is not determinative of whether the respondent is under an acknowledgment of allegiance for the simple reason that the House of Lords in **Joyce** was solely concerned with ascertaining the appellant's allegiance within the context of a treason charge. **Joyce** was not concerned with the interpretation and application of a disqualifying provision equivalent or similar to section 28(1)(a) of the Constitution. Similarly, **Hewitt v The Attorney General**, **Dabdoub v Vaz**,²³ **Green and Joseph v Saint Jean and Skerrit** and **Sykes v Cleary**, all of which have been cited by the appellant are of limited assistance to determining this issue. The issue in those cases was whether the application for, receipt of and use of foreign passports was sufficient to place persons who had dual citizenship under an acknowledgment of allegiance. In those cases, the relevant parties were citizens of the states that issued the passports. Properly understood, the holdings in **Hewitt**, **Dabdoub**, **Green and Joseph** and **Sykes** are, in the strict sense, not relevant to the issue

²³ CA 45 & 47 of 2008 (delivered 13th March 2008, unreported).

herein in so far as there is no evidence that the respondent in this appeal is a Dominican citizen. To the contrary, the respondent has made plain that he is not.

[54] In **Green and Joseph v Saint Jean and Skerrit** however, Mitchell JA [Ag.] in his dissenting judgment on the point of proving foreign law remarked, obiter, that ‘...it can in my view no longer be doubted that the mere acquiring of the passport of a foreign State amounts to a voluntary acknowledgment of allegiance to that State’. This proposition is supported by the learned authors of **The Constitution of the Commonwealth of Australia Annotated**,²⁴ wherein it is stated, speaking to the equivalent provision in the Australian constitution, that breach of this section ‘would usually be attested by the fact that the person has taken out foreign citizenship of that country, for example by accepting a foreign passport or serving in the armed forces of the foreign country’. Similarly, it is acknowledged by Gerard Carney in his article, **Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification**,²⁵ that an acknowledgment for the purposes of this section would appear to cover:

“...acceptance of a foreign passport, service in one of the foreign armed forces, taking an oath of allegiance to a foreign power (not a subject or citizen of that state), seeking the protection of a foreign state, or even describing oneself in an official document as a citizen or subject of a foreign state.”

Carney goes further to say that:

“...this limb appears not to extend to an appointment as an honorary consul or the acceptance of a foreign award or honour, nor to owing a ‘local allegiance’ which arises by virtue of temporarily residing in a foreign country.”

On this corollary of views, it appears that the respondent was under an acknowledgment of allegiance by virtue of his application for, receipt and use of a Dominican diplomatic passport.

²⁴ Fifth Edition, R D Lumb LLB, LLM (Melb), D Phil (Oxon), LLB (Qld) and G. A. Moens.

²⁵ (1999) 11(2) Bond Law Review 245.

[55] Putting aside the apparent conclusion to be arrived at from the statements above, I recognise that, in any event, whether there has been an acknowledgment of allegiance is a determination to be made on the facts of each case, and that an acknowledgment may be formal or informal as the court in **Nile v Wood**²⁶ found. It is therefore clear that the circumstances of this case must be weighed and examined against each other. On the appellant's case, the relevant facts are as follows, that:

- (i) the respondent voluntarily applied to the Government of Dominica to be issued a diplomatic passport;
- (ii) the diplomatic passport issued to the respondent by the state of Dominica reflected that he was a citizen of Dominica; and
- (iii) the respondent knowingly used his Dominican diplomatic passport to gain entry into 7 different countries on 10 different occasions, with the passport containing the endorsement quoted at paragraph 3 above.

On the other hand, Dr. Douglas' case rests on the following facts, that:

- (i) The diplomatic passport is said to have been issued to the respondent as a professional courtesy and for ease of travel;
- (ii) There is no evidence that Dr. Douglas ever sought intentionally to place himself under an allegiance to Dominica or took an oath of allegiance;
- (iii) On immigration forms completed by him, Dr. Douglas has consistently maintained that he is a citizen of Saint Christopher and Nevis; and
- (iv) When completing the application form for the diplomatic passport, he never completed the portion of the form which required a declaration of Dominican citizenship.

[56] The most that can be said on Dr. Douglas' case is that the use of his diplomatic passport amounted to an acknowledgment of the state's obligations to protect him

²⁶ [1988] HCA 30.

inclusive of the suite of protections and privileges that accompany that protection, but not an acknowledgment of an allegiance to the state. This argument does not, in my view, stand against the strength of the appellant's case. Dr. Douglas invoked the protection and privileges of the state of Dominica, by the presentation of his diplomatic passport, knowing well that the passport represented him as a subject and citizen of Dominica and not Saint Christopher and Nevis. It bears emphasising that the terms of the passport are unequivocal – it contains a clear endorsement in the terms recited at paragraph 3 above, and very clearly represents Dr. Douglas as a citizen of Dominica. How then can it be argued that he did not, whether formally or informally, take account of his fidelity, loyalty or allegiance to Dominica? It is difficult in the face of these undisputed facts to conclude that the requisite act(s) of acknowledgment of allegiance in respect of which section 28(1)(a) of the Constitution is aimed, have not been made out. Indeed, section 28(1)(a) could not be made to rest on what the respondent may have subjectively thought about his actions or his status but rather what, objectively the facts of applying for, the receipt and use of the foreign passport by the respondent establish as a matter of law.

- [57] Even if I am wrong in my analysis of the facts of this case, there is little that can be said to reasonably overcome the reality, that were the Commonwealth of Dominica minded to exercise a protective jurisdiction over Dr. Douglas, as a person who has an allegiance to the state, in order to try him for treasonous acts (subject to the laws for engaging that process), **Joyce** would provide clear authority for them to do so. In **Joyce**, the appellant's treasonous acts committed while he held a valid British passport made him liable for prosecution despite his status as a non-citizen and despite the acts having been committed in Germany. Being guided by the clear purpose of the section identified by the Smellie CJ in **Hewitt**, and Brennan J in **Sykes**, which I have adopted above, Dr. Douglas is therefore squarely within the circumstances against which section 28(1)(a) militates. By virtue of his allegiance in law to the Commonwealth of Dominica, Dr. Douglas is in fact not free to make decisions which are purely in the interests of Saint Christopher and Nevis, as there

is good authority for the possibility of his legitimate prosecution for any acts done by him which are against the interests of Dominica. By this fact, I am further propelled to the conclusion that Dr. Douglas by his application for, possession and use of a Dominican diplomatic passport, has, by his own act, placed himself under an allegiance to the Commonwealth of Dominica, has voluntarily acknowledged that allegiance, and therefore falls within the category of persons disqualified from sitting in the National Assembly under section 28(1)(a) of the Constitution.

Conclusion

[58] The cumulative effect of my conclusions is that Dr. Douglas, by his application for, receipt and use of a Dominican diplomatic passport, placed him in clear breach of section 28(1)(a) of the Constitution. As a matter of law, the consequence in the terms of section 33(3)(c) follows. That consequence is that, Dr. Douglas is required to vacate his seat in the National Assembly in Saint Christopher and Nevis.

[59] Regarding the appropriate orders to be made in this case, it is clear from my reasoning above that I take the view that the learned judge's order and judgment must be set aside. Further to that, I note that the appellant sought the remedies set out at paragraph 5 of this judgment, in the court below, and has renewed the prayer for those remedies before this Court. Given the wording of sections 28(1)(a) and 33(3)(c) of the Constitution, upon which the originating motion was founded, there is no real need for any substantive relief other than a declaration in the terms of those sections. I would also add that the public law nature of these proceedings justifies the application of the general rule that there should be no order as to costs in matters of this kind.

[60] I would therefore make the following orders and declaration:

- (i) The appeal is allowed, and the order of the learned judge is set aside.
- (ii) It is hereby declared that Dr. Douglas, by reason of his becoming a person who, by virtue of his own act, is under an acknowledgment of allegiance,

obedience or adherence to the Commonwealth of Dominica in breach of section 28(1)(a) of the Constitution, is required, pursuant to section 31(3)(c) of the Constitution, to vacate his seat in the National Assembly.

(iii) Each party shall bear their own costs before this Court and in the court below.

[61] I am grateful to learned counsel for the parties for their very detailed and well-researched submissions, both written and oral, which were of much assistance. Lastly, the delay, which is all mine and due to the pressures of the work of the Court, is regretted.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar